92-799

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, despite Congress's determination that the development of local air pollution control measures under the 1990 Amendments to the Clean Air Act is initially the responsibility of State and local governments, EPA is required to promulgate federal air pollution control plans for major urban areas in California because EPA found in 1988 that California had failed to meet requirements of the pre-1990 Act, even though those requirements were later repealed by the 1990 Amendments and replaced with new requirements that California has not yet had the opportunity to meet.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption, the United States Department of Transportation, the City of Sacramento, the Sacramento Area Council of Governments, Capital Gateway, Fong Ranch, William Payne, Kern Schumacher, Milburn Reid, Donald Ketscher, B & B Sons Enterprises, Centennial Development Co., and Whitney Properties were defendants in the district court; the Sierra Club was a plaintiff in the district court and appellee in the court of appeals.

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v.

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a) is unreported. The opinion of the district court (App., *infra*, 2a-6a), is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1992. On September 28, 1992, Justice

O'Connor extended the time for filing a petition for a writ of certiorari to and including November 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, are reproduced at App., *infra*, 7a-10a.

STATEMENT

This case raises the question whether the Clean Air Act, as amended in 1990, requires the Environmental Protection Agency (EPA) to promulgate a federal air pollution control plan for large portions of California merely because EPA found in 1988 that California had failed to meet requirements of the pre-1990 Act, requirements that were repealed by the 1990 Amendments. This question is the subject of EPA's petition for a writ of certiorari in *United States Environmental Protection Agency, et al.* v. *Coalition for Clean Air, et al.*, also filed today. The instant case was decided by the same panel of the Ninth Circuit that rendered the decision in *Coalition for Clean Air*. The panel's brief order affirming the judgment of the district court in this case relies entirely on the panel's earlier decision in *Coalition for Clean Air*.

1. As described in more detail in our petition in *Coalition for Clean Air*, the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, required each State to submit to EPA state implementation plans (SIPs) for achieving and maintaining national ambient air quality standards. Section 110(a)(1)(A), 42 U.S.C. 7410(a)(1)(A). The 1977

Amendments allowed EPA to extend the deadline for attainment of the primary air quality standards in certain "nonattainment areas." Section 172(a)(1), 42 U.S.C. 7502(a)(1).

California requested, and EPA approved, an extension of the statutory attainment date for ozone in the Sacramento Air Quality Management Area to December 31, 1987. In 1982, the State submitted an updated ozone SIP for Sacramento. EPA initially proposed to disapprove the revised SIP on grounds that the plan did not provide for attainment of the ozone standard by 1987. 48 Fed. Reg. 5074 (1983). On July 30, 1984, EPA took final action to approve the control measures submitted by the State, but left open the question whether to approve the attainment demonstration in the Sacramento SIP. 49 Fed. Reg. 30,300, 30,305 (1984). Thereafter, in November 1987, the Ninth Circuit held in *Abramowitz* v. *EPA*, 832 F.2d 1071 (1987), that EPA lacks authority to defer action on a State's attainment demonstration while approving the control measures submitted with that demonstration.

2. In March 1987, the Environmental Council of Sacramento and the Sierra Club [hereinafter respondents] filed this action in the United States District Court for the Eastern District of California, alleging *inter alia* that EPA had a nondiscretionary duty to disapprove the 1982 ozone SIP for Sacramento and to promulgate an ozone federal implementation plan (FIP) for the Sacramento nonattainment area.[1] Pursuant to an initial agreement with the re-

[1] At the time the lawsuit was filed, the Sacramento nonattainment area included Sacramento County, Yolo County, and portions of Placer and Solano Counties. The Sacramento nonattainment area boundaries have since been extended to include portions of Sutter and El Dorado Counties. See 57

spondents, EPA took final action to disapprove the 1982 ozone SIP on December 1, 1988. 53 Fed. Reg. 48,535 (1988). Subsequently, respondents and EPA negotiated a settlement containing a schedule by which EPA would propose and promulgate a federal implementation plan for ozone. The settlement agreement, which was approved by the district court on June 26, 1989, provided that EPA could move to vacate the settlement in the event that pending legislation affected its obligations to promulgate a FIP.

3. On November 15, 1990, the President signed into law the Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399. Those Amendments deleted the provisions of Section 172 requiring that SIPs demonstrate attainment by 1982 or, if an extension had been approved, by December 31, 1987. Instead, the 1990 Amendments imposed new requirements for ozone nonattainment SIPs. Sections 181, 182, 42 U.S.C. 7511, 7511a (Supp. II 1990).

Pursuant to the 1990 Amendments, the Sacramento area is classified as a "serious" area for ozone nonattainment. For an ozone area classified as "serious," the primary ozone NAAQS must be attained as expeditiously as practicable, but not later than nine years after enactment of the Amendments. Section 181(a), 42 U.S.C. 7511(a) (Supp. II 1990). A State containing an area classified as "serious" must submit, within four years of enactment, a demonstration that the area's ozone SIP will achieve attainment by the 1999 attainment date. Section 182(c)(2), 42 U.S.C. 7511a(c)(2) (Supp. II 1990). In addition, the Part D ozone SIP for the "serious" Sacramento

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Fed. Reg. 22,194, 22,195 n.1 (1992); 56 Fed. Reg. 56,694, 56,728 (1991).

area must meet new milestones for interim reductions in emissions. 42 U.S.C. 7511a(b)(1), (c)(2)(A), (B), (C), and (g) (Supp. II 1990). As described in our petition in *Coalition for Clean Air*, moreover, the 1990 Amendments also substantially revised Section 110(c) with respect to the circumstances under which EPA would have to prepare FIPs. 42 U.S.C. 7410 (c)(1) (Supp. II 1990).

4. After reviewing the language and legislative history of the 1990 Amendments, which wrought comprehensive changes in the operation and structure of the Act, the EPA concluded that its pre-1990 obligations to promulgate FIPs in areas where it had found SIPs inadequate had been eliminated by the 1990 Amendments. Accordingly, EPA filed a motion to vacate the settlement in the *Coalition for Clean Air* case, then pending in the United States District Court for the Central District of California. After that court ruled in EPA's favor, EPA filed a similar motion in the instant case, asking the district court below to vacate the settlement agreement and dismiss the complaint in light of the 1990 Amendments.

The district court denied EPA's motion. App., *infra*, 2a-6a.[2] The district court found that the relevant language of the 1990 Amendments was ambiguous, but declined to defer to EPA's interpretation of the 1990 Amendments because it concluded that the Agency's interpretation had changed over time. App.,

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[2] The district court agreed with the *Coalition for Clean Air* district court's conclusion that the savings clause of the 1990 Amendments, Section 193, 42 U.S.C. 7515 (Supp. II 1990), did not apply to the settlement agreement in this case, because an agreement to promulgate a FIP is not a "control requirement" within the meaning of the savings clause. App., *infra*, 4a.

infra, 4a-5a. The district court observed that, prior to enactment of the 1990 Amendments, the EPA Administrator had sent a letter to the House of Representatives taking the position that the Amendments would require EPA to comply with " 'current FIP obligations.' " *Id.* at 5a. In the court's view, this pre-enactment letter, rather than the Agency's post-enactment analysis of the 1990 Amendments, constituted the contemporaneous agency interpretation of the amended Act to which judicial deference was due. *Ibid.*

5. EPA appealed to the United States Court of Appeals for the Ninth Circuit, and the case was submitted to the same panel that had already heard argument in the appeal in the *Coalition for Clean Air* case.[3] On July 1, 1992, that panel ruled in *Coalition*

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[3] After EPA filed its appeal in this case, the parties agreed that the Ninth Circuit's decision in the *Coalition for Clean Air* case would likely determine EPA's duties in this case. Accordingly, the parties entered into a stipulation modifying the settlement agreement to provide that in the event the *Coalition* decision established EPA's duty to promulgate a FIP, EPA would issue a proposed FIP for Sacramento within four months of issuance of the mandate in the *Coalition* case, and a final FIP six months thereafter. See 57 Fed. Reg. 10,749 (1992). This stipulation also provided that EPA would in the interim publish a list of control measures that it would include in any proposed FIP, rank those measures, and estimate emission reductions from each measure. EPA published this listing on May 27, 1992. 57 Fed. Reg. 22,194 (1992).

In an order issued on September 29, 1992, Circuit Judge Norris granted EPA's motion to stay issuance of the mandate in *Coalition for Clean Air* pending review by this Court. Under the terms of the above-referenced stipulation, that order also acted to stay EPA's obligations with respect to the Sacramento FIP. On October 8, 1992, respondents in

for Clean Air that new Section 110(c)(1)(B) retains pre-existing FIP obligations, even where (as here) the statutory provisions forming the basis for those obligations have been repealed by the 1990 Amendments. On July 9, 1992, the court of appeals panel issued a one-paragraph order affirming the judgment of the district court in the instant case on the basis of the court's opinion in *Coalition for Clean Air*. App., *infra*, 1a. Judge Noonan dissented, for the reasons given in his dissent in *Coalition for Clean Air*. *Ibid.*

REASONS FOR GRANTING THE PETITION

This case raises legal issues identical to those presented in the petition for a writ of certiorari in *United States Environmental Protection Agency et al.* v. *Coalition for Clean Air, et al.*, filed concurrently with the filing of this petition. Accordingly, this petition should be held and disposed of in light of this Court's disposition of the petition in *Coalition for Clean Air*.

1. Just as in *Coalition for Clean Air*, the decision below interprets the 1990 Clean Air Act Amendments to preserve EPA's pre-1990 obligation to promulgate a FIP in lieu of a SIP that had been disapproved under the pre-1990 version of the Act, even though the particular requirement of the Act that gave rise to that disapproval has been eliminated as a result of the 1990 Amendments. As explained more

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this case moved the district court for an order modifying the settlement so that EPA's duties would no longer be tied to the mandate in *Coalition for Clean Air*, but would run instead from the date of the court of appeals mandate in the instant case, which issued on July 31, 1992. EPA filed an opposition to that motion on October 30, 1992, and the matter is now under submission.

fully in our petition in *Coalition for Clean Air*, the court of appeals' ruling dramatically alters the manner in which Congress chose to implement the new Amendments. The decision forces EPA to promulgate a FIP for the Sacramento area before the State of California has had an opportunity to produce a SIP implementing the requirements of the 1990 Amendments, even though Congress plainly intended that EPA would be called on to produce a FIP only if—and only to the extent that—the State has first failed to meet its obligations under the amended Act after having been given an opportunity to meet those obligations.

2. This case also is like *Coalition for Clean Air* in the dramatic impact the decision below is likely to have on the residents and economy of the Sacramento area. The Sacramento ozone-nonattainment area includes two urban counties and parts of four rural counties with a 1990 population of 1.6 million. Rapid population growth is expected in the 1990s. The area currently has the sixth largest number of average expected exceedances of the ozone standard in the country. Less than 10% of emissions of ozone precursors come from stationary sources. 52 Fed. Reg. 26,431, 26,434 (1987). Accordingly, emission reduction strategies will have to be targeted primarily at mobile sources, as well as at area sources such as pesticide application and architectural coatings. As explained in the petition in *Coalition for Clean Air*, EPA does not have the same range of techniques at its disposal to regulate these sources as do state and local authorities.

Moreover, since Sacramento is designated as a "serious" nonattainment area for ozone, the FIP must seek to attain the relevant national standard by 1999. This could require massive near-term reduc-

tions in emissions of ozone precursors. See 57 Fed. Reg. 22,194, 22,196 (1992) (suggesting that attainment of the ozone standard in the Sacramento area will require 75% reduction in emissions over a five-year period). In addition, recent data indicate that Sacramento's air pollution violations may be caused, on many occasions, by transport of pollution from the San Francisco Bay area or the San Joaquin Valley. In light of these unresolved issues regarding pollution transport, premature promulgation of a FIP could result in draconian control measures that are either counterproductive or unnecessary. Thus, the decision below is likely to have disruptive effects in the Sacramento area similar to those that the decision in *Coalition for Clean Air* threatens in the Los Angeles area.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's disposition of the petition for a writ of certiorari in *Coalition for Clean Air*.

Respectfully submitted.

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NOVEMBER 1992

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92-15293

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., ET AL., PLAINTIFFS-APPELLEES

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS-APPELLANTS

[Filed July 9, 1992]

ORDER

Before: Goodwin, Norris, and Noonan, Circuit Judges.

Appellants' and appellees' joint motion to submit this case to the panel considering the appeals in *Coalition for Clean Air v. EPA*, Nos. 91-55383, 91-55386, is GRANTED based on the parties' joint stipulation. The judgment of the district court is AFFIRMED. *Coalition for Clean Air v. EPA*, Nos. 91-55383, 91-55386 (9th Cir. 1992).

NOONAN, Circuit Judge:

For the reasons given by me in *Coalition for Clean Air v. EPA*, Nos. 91-55383, 91-55386, I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Civ. No. S-87-420 EJG

ENVIRONMENTAL COUNCIL OF SACRAMENTO, INC., ET AL., PLAINTIFFS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS

[Filed Dec. 2, 1991]

ORDER

The matter is before the court on defendant Environmental Protection Agency's ("EPA") motion to vacate the stipulation of settlement and order thereon and to dismiss the complaint. In this action, plaintiffs seek to compel EPA to promulgate a federal implementation plan ("FIP") for attainment of the primary National Ambient Air Quality Standards ("NAAQS") for ozone for the Sacramento area, pursuant to the Clean Air Act ("Act").[1] On April 17, 1989, plaintiffs and defendant EPA entered into a settlement agreement, subsequently modified twice by stipulation and order, under which EPA agreed to "undertake the promulgation of a FIP for the attain-

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[1] 42 U.S.C. §§ 7401 *et seq.*

ment and maintenance of the primary NAAQS for ozone for the Sacramento area." The action was then stayed.

Last year, the Clean Air Act Amendments of 1990 ("Amendments") were signed into law. Pub. L. No. 101-549, 104 Stat. 2399 (codified at 42 U.S.C. §§ 7401 *et seq.* (1990)). EPA contends that the Amendments have vitiated the legal foundation underlying the agency's obligation to promulgate a FIP in the Sacramento area. Plaintiffs, however, dispute the point vigorously, and argue that EPA retains its obligation to promulgate a FIP even under the amended Act.

The parties have briefed the matter thoroughly, and the court heard extensive oral argument at the November 15, 1991 hearing on the motion. The parties have addressed several concerns raised by the undersigned, and the court is now prepared to rule on the motion.

The Act, as amended, provides, in relevant part, that the EPA Administrator "shall promulgate a Federal implementation plan at any time within 2 years after the Administrator— . . . (B) disapproves a state implementation plan submission in whole or in part . . . ." 42 U.S.C. § 7410(c) (1990). The question presented is whether the disapproved state plan to which the statute refers may be, as plaintiffs contend, a plan previously disapproved by the agency under the old law or whether, as the agency asserts, the state plan must be one promulgated subsequent to enactment of, and under the terms of, the new law.

As both sides note, United States District Judge Hupp of the Central District of California recently considered and ruled on the very issues now before this court. *See Coalition for Clean Air v. E.P.A.*, 762 F. Supp. 1399 (C.D. Cal. 1991). Judge Hupp's opin-

ion is thorough and well-reasoned, and this court agrees with his analyses of the statute's ambiguity and of the "savings clause" provision,[2] which analyses do not now bear repetition. However, the undersigned must part company with Judge Hupp as to the degree of deference to be accorded EPA's interpretation of the Amendments under the peculiar circumstances presented and must also differ with *Coalition for Clean Air* as to the significance of the language of a prior version of the statutory provision at issue.

Where, as here, a statute is ambiguous with respect to a specific issue, but the agency which must administer the statute has construed it, the court must determine whether the agency's answer is based on a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 2781-82 (1984). This is so because considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. *Id.*, 467 U.S. at 843, 104 S. Ct. at 2782. However, an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to *considerably less deference* than a consistently held agency view. *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 466, 107 S. Ct. 1207, 1221 n.30 (1987).

Here, the agency's interpretation of the relevant provision has plainly changed over time. In a May 22, 1990 letter criticizing the House of Representatives for retaining mandatory FIP provisions, EPA Administrator William Reilly noted that "[t]he House has [deleted] language that relieved EPA of its current obligations to complete federal implementation

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[2] Pub. L. 101-549, Title I, § 108(1), 104 Stat. 2469 (codified at 42 U.S.C. § 7515 (1990)).

plans (FIP's) . . . In light of the new regime for state plan submissions, *it makes no sense for EPA to impose FIPs before the states have had a chance to meet their new obligations . . . In addition to current FIP obligations*, the House Committee bill requires EPA to promulgate comprehensive FIPs in the future . . . ." 136 Cong. Rec. H2771, H2887 (daily ed. May 23, 1990) (emphasis added).

Thus, the agency's *contemporaneous* construction of the statute was in harmony with plaintiffs' present position. Now, however, EPA contends that § 7410(c) has the opposite effect—*viz*, that it *relieves* the agency's current FIP obligations. Plaintiffs suggest that this indicates that the agency, having failed to get what it wanted from Congress, is now attempting to achieve the same result in the courts. While there may be some merit to this argument (*see infra*), the court need not speculate on this. For our purposes, the critical fact is that the agency's contemporaneous construction carries persuasive weight, while its current interpretation, being in conflict with its initial position, is entitled to considerably less deference. *Watt v. Alaska*, 451 U.S. 259, 272-73, 101 S. Ct. 1673, 1681 (1982). The court is therefore inclined to defer to the agency's initial construction, and conclude that amended § 7410(c) maintains EPA's existing FIP obligations.

Further support for this conclusion lies in the fact that Congress contemplated, but rejected, an interim version of the Amendments which would have made FIP's discretionary rather than mandatory. As EPA Administrator Reilly noted, this version of the bill would have "relieved EPA of its current obligations to complete" FIP's. 136 Cong. Rec. H2771, H2887 (daily ed. May 23, 1990). Of course, the rejected ver-

sion would also have had much broader consequences: the bill, by making FIP's entirely discretionary, would have eliminated EPA's *current and future* obligations to promulgate FIP's under *any* circumstances. Thus, Congress may well have rejected this approach to prevent this broader result, rather than simply to maintain EPA's existing FIP obligations. Nonetheless, it is well-settled that when Congress deletes from its final product a provision that appeared in an earlier version of the legislation, "its action strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corporation v. Copp Paving Company, Inc.*, 419 U.S. 186, 200, 95 S. Ct. 392, 401 (1974).

For the foregoing reasons, the court concludes that Congress, in enacting the Amendments, did intend to retain EPA's duty to promulgate FIP's in cases such as the one at bar. EPA's motion to vacate the settlement agreement and dismiss the complaint is therefore denied.[3]

IT IS SO ORDERED.

Dated 11/27/91.

/s/ Edward J. Garcia
EDWARD J. GARCIA
Judge
United States District Court

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[3] The court also notes that the "established rule" is that a change in the law does not render an agreement void. *Anita Foundations v. ILGWU National Retirement Fund*, 902 F.2d 185, 189 (2nd Cir. 1990). However, the parties did not address this problem, and *Anita Foundations* is sufficiently factually dissimilar from the case at bar that the court does not rely on this general principle, which may well be inapposite here, in reaching its conclusion.

APPENDIX C

STATUTORY PROVISIONS INVOLVED

Section 101 of the Clean Air Act, as amended, 42 U.S.C. 7401, provides:

(a) Congressional findings

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles; has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and

local programs to prevent and control air pollution.

(b) Declaration of purpose

The purposes of this subchapter are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention

A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

Section 110(c) of the Clean Air Act, as amended, 42 U.S.C. 110(c), provides:

> (c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; parking surcharge; plan implementation
>
> (1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—
>
> (A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under section 7410(k)(1)(A) of this title, or
>
> (B) disapproves a State implementation plan submission in whole or in part,
>
> unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

Section 193 of the Clean Air Act, 42 U.S.C. 7515, provides:

> Each regulation, standard, rule, notice, order and guidance promulgated or issued by the Administrator under this chapter, as in effect before November 15, 1990 shall remain in effect according to its terms, except to the extent otherwise provided under this chapter, inconsistent with any provision of this chapter, or revised by the Administrator. No control requirement in effect, or required to be adopted by an order, settlement

agreement, or plan in effect before November 15, 1990 in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990 in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant.

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